FILE COPY

Supreme Court, U.S.
FILED
AUG 16 1973
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-158

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

CLYDE H. DUNCAN,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MORTIMER A. ROSECAN
ROSECAN and POPKIN
1015 Locust Street—Suite 530
St. Louis, Missouri 63101
Counsel for Respondent

St. Louis Law Printing Co., Inc., 312 Olive Street 63101 314-231-4477

INDEX

	Page
Introduction	1
Opinions Below	2
Questions Presented	2
Statement	2
Argument	3
(a) This case does not warrant review	3
(b) There is no conflict of decisions involving substantive rights under the FELA	5
Conclusion	9

TABLE OF AUTHORITIES

Cases

Ballantine v. Central R.R. of New Jersey, 460 F.2d 540 (3rd Cir. 1972), cert. denied 409 U.S. 879	4, 6
Chesapeake & O. Ry. Co. v. Kelly, 241 U.S. 485 (1916)	5
Grunenthal v. Long Island R. Co., 393 U.S. 156 (1968)	3
McWeeney v. N.Y., N.H. & H. RR. Co., 282 F.2d 34 (2d Cir. 1960), cert. denied 364 U.S. 870	7
Sleeman v. Chesapeake & Ohio Ry. Co., 414 F.2d 305 (6th Cir. 1969)	6

Statutes

45 USC § 51 et seq.	1

Miscellaneous

Rule 39, Federal Rules of Civil Procedure	3
Vol. 26-27 NACCA Law Journal	7
Felix Frankfurter Reminisces	8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-158

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

CLYDE H. DUNCAN,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner, St. Louis-San Francisco Railway Company, (hereinafter called "Frisco") seeks a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. That Court, on May 15, 1973, affirmed a $94,000 judgment for personal injuries in favor of respondent in an action he brought against Frisco under the Federal Employers' Liability Act, 45 USC § 51 et seq. The Eighth Circuit Court of Appeals, on June 19, 1973, denied Frisco's petition for re-hearing.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (there were no dissents) is not yet reported. It is annexed to the Petition as Appendix A, pages A-1 through A-13. The trial judge did not file a written opinion.

QUESTIONS PRESENTED

Both questions sought to be presented by Frisco were directly ruled upon below by the trial court and the Eighth Circuit Court of Appeals. While Frisco speaks of the questions as involving "the proper measure of damages in cases arising under the Federal Employers' Liability Act", they touch only upon the quantum of damages and do not go to the substantive law of damages. In essence, the questions sought to be reviewed are:

A. With respect to the amount of damages to be awarded for loss of future earnings, is there a need for this Court to formulate detailed evidentiary and procedural guidelines for arriving at the present value thereof to be uniformly followed by all courts having original jurisdiction of cases under the FELA?

B. Do trial courts need direction to determine if cautionary instructions should be given to the jury concerning possible income tax implications of a plaintiff's award?

STATEMENT OF THE CASE

Frisco's "Statement of the Case" neglects to mention that it filed post-trial motions in the District Court seeking a remittitur or a new trial on grounds that the verdict was excessive. These motions were carefully considered by the trial court and denied. The Eighth Circuit Court of Appeals affirmed without dissent.[1]

---

[1] The pertinent facts are more fully and fairly set out in the opinion of the Court of Appeals.

ARGUMENT

(a) **This case does not warrant review.**

The proceedings in the courts below did not deny Frisco any substantive right and a correct result was reached. The questions presented in the Petition could, at most, only influence the amount of damages awarded by the jury. Adequate remedies for curing excessive verdicts are already vested in both the trial and appellate courts. *Rule 59, Federal Rules of Civil Procedure; Grunenthal v. Long Island R. Co.* (1968), 393 U. S. 156, footnote 3 at p. 157.

As heretofore indicated, in its post-trial motions in the District Court, Frisco sought a remittitur or new trial on grounds that the verdict was excessive—*but not because of the matters raised in the Petition.* Instead, Frisco asserted that the verdict was excessive because of plaintiff's argument to the jury on matters having nothing whatever to do with the questions sought to be reviewed here. (Appendix, p. 24, para. 26; and p. 25, paras. 2, 3, 4). The trial court found that the verdict was not excessive.

In the Court of Appeals, Frisco abandoned excessiveness as grounds for relief. With respect to the matters raised in the Petition, Frisco contended that "there was no evidence to support an award of damages for future loss of earnings and no evidence or instructions regarding the manner in which the present value of such an award should be computed" (P. A-3 of the Petition). Of this contention the Eighth Circuit wrote:

> "(5) Frisco's assertion that there was no evidence that Duncan would suffer loss of earnings in the future is clearly contrary to the record.
>
> . . . . . .

> Frisco also argues that it was error to have permitted the jury to award damages to Duncan for loss of future earnings without there either being evidence or instructions regarding the manner in which the present value of such award should be computed. *Frisco makes this contention even though at trial it did not request such an instruction.* We are persuaded that the trial court's instruction on this issue was sufficient. It served to alert the jury to the fact that they had to take into consideration the earning power of money and reduce it to its present value:" (P. A-11 of the Petition) (Emphasis supplied).

On the state of this record several conclusions are apparent: (1) The verdict is not excessive; (2) Frisco has never once contended, either in the trial court or in the court of appeals, that the matters sought to be reviewed in this Court resulted in an excessive or inflated verdict; (3) While Frisco's Petition speaks of an "unreasonably inflated" verdict, it has not pointed to anything in the record of this case suggesting that the complained-of matters inflated the verdict or even enhanced it one dollar;[2]

---

[2] Frisco makes the bland assertion that "The unguided search of the jury . . . resulted in a verdict of nineteen times the wage loss of respondent." (Petition, p. 12). Frisco's multiplication is misleading and needs clarification. The wage loss of respondent that approximates the jury verdict when multiplied by nineteen is the $5,000 he lost before trial while hospitalized because of his injuries. Frisco neglects to mention that the jury verdict also reflects the evidence that showed the nature and extent of respondent's injuries, his severe pain and suffering both past and future, and, as found by the court of appeals, the evidence that "his work life would have to be cut short of its ordinary length as a consequence" of his injuries. (P. A-11 of the Petition).

Frisco also neglects to mention that it chose not to offer "guidance" to the jury at the conclusion of the evidence when it waived argument. As a result, plaintiff was denied the opportunity to close. In *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540 (3rd Cir. 1972), *cert. denied*, 409 U.S. 879, relied on by Frisco, the Third Circuit, in the same context as here, seemed to place great store on the importance of argument to the jury. *Id.* at 542, 544.

(4) If either of the courts below had believed that the complained-of matters resulted in an unjust or inflated verdict, appropriate relief would have been granted.

Thus, there is nothing in the record to suggest that Frisco was denied any substantive right accorded it under the Act; and there is nothing in the record to suggest that respondent received more than the Act intended to give him. It logically follows that this Court's review of the questions presented in the Petition would not change the result as affirmed by the Eighth Circuit. For these reasons alone, this case is unworthy of this Court's review.

(b) **There is no conflict of decisions involving substantive rights under the FELA.**

Frisco does not contend that Plaintiff was awarded an impermissible element of damages. The questions it presents involve no more than the minutiae of evidentiary and procedural matters that touch only upon the amount of the jury verdict. Review by this Court is not necessary to achieve uniformity of the substantive law of damages in FELA cases. That uniformity already exists.

Since this Court's decision in *Chesapeake & O. R. Co. v. Kelly* (1916), 241 U.S. 485, federal courts uniformly require that damages for lost future wages be reduced to "present cash value". The jury was so instructed in this case. Both the district judge and a three judge panel of the Eighth Circuit found that the trial court's instruction was both understood and followed by the jury. (Pages A-11 and A-12 of the Petition). As heretofore indicated, Frisco has utterly failed to demonstrate otherwise.

If the absence of detailed evidence of present value, or the absence of detailed instructions concerning it, contributes to a denial of substantive rights, the district courts will take corrective action or such actions will be

ordered by appellate courts.[3] We respectfully suggest that the administration of justice is better served if these matters are left to the trial courts, subject to appellate review, rather than harnessing trial courts with the "uniformity" sought by the Petition. There is nothing to indicate that awards of damages by federal courts have failed to accord FELA litigants all of the substantive rights to which they are entitled under the Act.

The point we make here is that the questions presented for review are nothing more than an invitation for this Court to unnecessarily embroil itself in a well-nigh impossible and never ending attempt to achieve detailed evidentiary and procedural uniformity in the "no-two-case-alike" litigation carried on day to day in the various state and federal forums in which Congress has vested concurrent jurisdiction over cases brought under the Act. For instance, in this case, respondent Duncan was fifty-four years old at the time of trial. For the two years preceding trial he suffered no loss of earnings. Yet, as the Eighth Circuit pointed out: "Three of the medical witnesses, who treated the Plaintiff, affirmatively testified that they believed his work life would have to be cut short of its ordinary length as a consequence of injuries sustained by him in the train accident." (P. A-11 of the Petition). No one could foretell when Duncan's injuries would end his work capability during the ensuing eleven years until age sixty-five. Evidence to show the present value of his shortened work life, if it were to encompass all the possibilities, would have needlessly prolonged the trial to the utter confusion of the jury. To further ensnarl the jury in the application of a complex formula for arriving at present value, predicated upon varying rates of return, and

---

[3] The cases relied upon by Petitioner to illustrate "conflict", such as *Ballantine v. Central Railroad of New Jersey, supra,* and *Sleeman v. Chesapeake & Ohio Railway Co.,* 414 F. 2d 305 (6th Cir. 1969), are examples of the willingness of appellate courts to take corrective action when needed.

covering all the possible applicable time periods, would surely have confused rather than aided a conscientious jury.[4]

Divergences between courts in minor matters of evidence and instructions relating to the amount of damages for injuries to person are nothing new. They are to be expected and, indeed, are necessary if the judicial process is to reach a just result on the widely differing facts of each case. So long as substantive rights are not abridged, these divergences are not only unworthy of this Court's intervention—they deserve this Court's sanction.

What has heretofore been said is equally applicable to Frisco's request for this Court to require that juries be given a cautionary instruction anent the income tax consequences of a damage award. The identical question was thoroughly dealt with in *McWeeney v. N.Y., N.H. & H. R.R. Co.*, 282 F.2d 34 (2d Cir. 1960), *cert. denied*, 364 U.S. 870 (1960).[5] Cautioning the jury not to increase an award because of federal income taxes is again a matter that touches only upon the amount of the verdict. Before this question would assume sufficient importance to warrant this Court's intervention, there ought to be persuasive evidence that juries in general increase recoveries on this account. Frisco has pointed to nothing in this record to indicate that the jury did so in this case; and, as Judge Friendly stated in *McWeeney*, "The published material . . . is too slender to support a judgment that juries do this generally."

---

[4] The number of FELA cases whose peculiar facts resist the application of a uniform standard of evidence and procedure for determining present value must surely be like sands on the beach. Petitioner suggests, with some merit, that the uniformity should also apply to Jones Act cases. The next step, of course, is to create uniformity in proving every element of damage in all cases.

[5] See also an exhaustive note on this subject in NACCA Law Journal, Vols. 26-27, pp. 294-302.

As in the instance of "present value", if either the District Court or the Court of Appeals believes that the failure to instruct on tax consequences has led to an excessive verdict, they are already vested with the power to order a remittitur or a new trial.

> "To be sure a practice of refusing the instruction in most cases but requiring some adjustment in a few lacks precision and elegance; but we cannot disregard the practicalities of judicial administration and 'the law is untidy as life with which it deals'.[14] Just where the line should be drawn must be left, as so much is, to the good sense of trial judges, . . ."

---

[14] Felix Frankfurter Reminisces (1960), p. 21. *McWeeney, supra,* at p. 39.

That "the law is untidy as life with which it deals" is aptly demonstrated by the questions presented in this case. As others have suggested, if the defendant is allowed to tell the jury that the final award should reflect the fact that plaintiff does not have to pay any income tax on the verdict, then surely fairness would demand that plaintiff should be permitted to tell the jury to increase the award by one-third to take care of the attorneys' fee; and plaintiff should be allowed to tell the jury that the defendant Railroad can take a business deduction for losses sustained as a result of a verdict for plaintiff.

Instructions that emphasize what the jury ought *not* consider result in a confusing and negative approach in assessing damages for personal injuries. At present, juries in the federal courts are told of the positive elements of damage they may properly take into account in arriving at a verdict. That this approach has dealt fairly with defendants in FELA cases is demonstrated by the relatively few instances in which the courts below have found it necessary to cure excessive jury awards.

"The practicalities of judicial administration" require that evidence and instructions concerning present value and tax implications of a damage award "must be left, as so much is, to the good sense of trial judges".

CONCLUSION

For the reasons stated, the Petition does not present any questions warranting review by this Court and should be denied.

Respectfully submitted

MORTIMER A. ROSECAN
ROSECAN and POPKIN
1015 Locust Street—Suite 530
St. Louis, Missouri 63101
Counsel for Respondent

August 16, 1973

Certificate of Service

I hereby certify that on this 16 day of August, 1973, three copies of the Brief for Respondent in Opposition to Petition for a Writ of Certiorari were delivered to John L. Davidson, Jr., 721 Olive Street, St. Louis, Missouri 63101, Counsel for Petitioner.

Mortimer A. Rosecan
Rosecan and Popkin
1015 Locust Street
St. Louis, Missouri 63101
Counsel for Respondent